



## Decision

**Matter of:** MLS-Multinational Logistic Services, Ltd.; MLSUSA Corporation

**File:** B-418477.3; B-418477.4

**Date:** September 28, 2020

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Walter A. I. Wilson, Esq., and Sunni R. Harris, Esq., Dinsmore & Shohl LLP, for the protester.

David L. Koman, Esq., Department of the Navy, for the agency.

Stephanie B. Magnell, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging the terms of a solicitation is denied, where the protester has not shown by clear and convincing evidence that performance is an impossibility.

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### DECISION

MLS-Multinational Logistic Services Ltd., of Gzira, Malta, and MLSUSA Corporation, of Longmeadow, Massachusetts, acting as a single company, MLS, protest the terms of request for proposals (RFP) No. N68171-20-R-0001, which was issued by the Department of the Navy, Naval Supply Systems Command, for maritime husbanding support services worldwide. The protester asserts that the solicitation contains conflicting requirements that are impossible to perform concurrently.

We deny the protest.

### BACKGROUND

On December 31, 2019, the Agency issued the RFP with the intent to award multiple-award indefinite-delivery, indefinite-quantity contracts for maritime husbanding support of Navy ships at approximately 2,287 ports worldwide. RFP at 2;<sup>1</sup> Contracting Officer's Statement (COS) at 3. The contracts will be issued with a 5-year base period and a 5-year option period, for a total period of performance of 10 years. *Id.* at 2, 6. Each period has a maximum value of \$1,061,000,000. *Id.*

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<sup>1</sup> Citations to the RFP are to the conformed copy at agency report (AR) tab 11.

The initial RFP deadline for proposal submission was February 18, 2020. AR, Tab 6, RFP amend. 0005 at 1. Several days prior, on February 14, each MLS entity filed a pre-award protest with our Office. These protests were docketed as B-418477 and B-4187477.2. MLS argued that the terms of the solicitation were impossible to perform and did not reflect the Navy's minimum needs.<sup>2</sup> Protests, B-418477, B-4187477.2. The protesters also asserted that the solicitation unduly restricted competition and deprived them of a fair opportunity to compete for task orders. *Id.*

On May 4, the GAO attorney assigned to the protest held a conference call with the parties to discuss the relative risks of the parties' positions.<sup>3</sup> COS at 16. In the call, the GAO attorney advised the agency that she considered there to be a risk to the Navy in the formulation of RFP paragraph 1.3, specifically with regard to the representations the contractor was to make related to any status as the Navy's agent. *Id.*

The Navy subsequently filed a notice of corrective action, stating that it intended to amend the solicitation and allow offerors to revise their proposals. Notice of Corrective Action & Req. for Dismissal, B-418477, May 7, 2020; Resp. to GAO Req. for Clarification, B-418477, May 11, 2020; Notice of Corrective Action & Req. for Dismissal, B-418477.2, May 7, 2020; Resp. to GAO Req. for Clarification, B-418477.2, May 11, 2020. Our Office dismissed the protests as academic on the basis of the agency's proposed corrective action. *MLS-Multinational Logistic Servs., Ltd.; MLSUSA Corp.*, B-418477, B-4187477.2, May 12, 2020, (unpublished decision).

On June 18, the Navy issued amendment 0007 to the solicitation, revising the contested language in paragraph 1.3 and extending the solicitation closing date to June 25. AR, Tab 8, RFP Amend. 0007. The revised solicitation provision at issue now reads, in relevant part, as follows:

1.3 This contract is for support of sovereign vessels of the United States. Many of the usual relationships and practices in commercial ships' husbanding do not apply. This contract governs the relationship between

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<sup>2</sup> The disputed language was included in an earlier version of RFP paragraph 1.3, which stated in part:

Nonetheless, the Navy recognizes that compliance with port regulations may require the HSP [husbanding services provider] to represent itself as the Navy's agent for purposes of arranging husbanding services on behalf of U.S. Government and other authorized vessels that the HSP is contracted to support. Although the HSP may not legally bind the United States, the HSP may make such representations in furtherance of its integration of services function under the contract.

AR, Tab 8, Conformed RFP Copy as of Mar. 31, 2020, at 15.

<sup>3</sup> The call was not alternative dispute resolution in the form of outcome prediction, but rather the GAO attorney's assessment of litigation risk. COS at 16.

the United States Navy and the HSP. This contract governs and supersedes any usual commercial practice that conflicts with the terms of the contract. This contract creates an independent contractual relationship between the HSP and the United States Navy. The HSP is the prime contractor to provide the Navy all requirements called for in a task order. Only the HSP contractor has privity of contract with any other entity, including port authorities that the HSP uses to execute a task order. The HSP contractor may inform entities with which it must cooperate to execute a task order that it has a contract with the United States Navy to integrate and provide port services to a sovereign vessel of the United States. A firm that provides integrated husbanding services, such as the services required by this contract, is sometimes referred to in the commercial ships' husbanding business as an "agent." Often "agents" in the commercial husbanding business have the authority to bind their principals, but in some instances the "agents" do not have that authority. The HSP under this contract has no authority to bind the United States Navy. If necessary, only for the purpose of standard port authority documentation requiring the listing of an "agent" for the ship or vessel, the HSP may list itself as an "agent" for obtaining the port services required to execute a task order. In listing itself as an "agent," however, the HSP must make clear to the port authority the nature of its relationship with the United States Navy, *i.e.*, that it is an independent contractor, with no authority to bind the United States Navy and the HSP remains liable for its actions and the actions of its subcontractors under the contract. An HSP, in preparing its task order proposal, or in executing a task order issued to it, shall promptly bring to the attention of the Contracting Officer any difficulties that arise from a port authority because of the HSP's contractual relationship with the Navy. [ . . ]

The HSP does not have the authority to:

- a. Exert ultimate control over the acquisition, use, or disposition of Government property (real or personal, tangible or intangible), including establishing policies for the collection, control, or disbursement of Federal Funds;

[ . . ]

- c. Commit or bind the United States, to include requiring the Government to take, or not to take, action by contract, policy, regulation, authorization, order, or otherwise.

RFP at 15-16. In the following paragraph, the revised RFP provides that:

In performing this contract, the HSP shall comply with its terms and with laws or regulations of the country where performance occurs to include applicable environmental, safety and health regulations, and shall obtain

any insurances, licenses or permits required by these laws or regulations. If there is a difference between the terms of this contract and laws or regulations of the country where performance occurs, the HSP shall promptly notify the Government if it believes that it will be unable to fully perform specified tasks or provide specified requirements because of problems, disputes, or complications with the respective country where performance occurs.

RFP at 16.

The protester timely filed this protest on June 24.

## DISCUSSION

The protester asserts that compliance with the provisions in paragraph 1.3 is impossible.<sup>4</sup> Protest at 15. MLS argues that it is unable to both “inform the port authority that it is not the Navy’s agent and, on the other hand, to tick the box on the port entry vessel form that it actually is the Navy’s agent for that particular vessel/s and contemporaneously ensure performance of the task order in accordance with the laws of the country in which the port is located.” *Id.* at 3. The protester asserts that the authority of the “agent” in port authority forms cannot be limited in scope as described in paragraph 1.3, and thus performance is impossible.

A contracting agency has the discretion to determine its needs and the best method to accommodate them; the responsibility for drafting proper specifications that reflect the government’s needs rests with the contracting agency. *Pride Mobility Products Corp.*, B-405371, Oct. 25, 2011, 2011 CPD ¶ 227 at 4-5. We will not question an agency’s

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<sup>4</sup> We have considered all of the protester’s arguments and, although not all are addressed here, none provides a basis to sustain the protest. For example, MLS objects to the following phrase in the amended paragraph 13: “Many of the usual relationships and practices in commercial ships’ husbanding do not apply[.]” Protest at 7. The protester contends that “a legal opinion on English law which MLS submitted in our prior protest” demonstrates that this phrase is “inaccurate.” *Id.* The protester does not explain the relevance of its previously-submitted private opinion on English law to the amended solicitation nor why the Federal Acquisition Regulation (FAR) provisions that govern this procurement would not take precedence.

Similarly, the protester objects to the provision which states: “[t]his contract governs the relationship between the United States Navy and the HSP. This contract governs and supersedes any usual commercial practice that conflicts with the terms of the contract[.]” *Id.* Citing no legal authority, the protester argues that this provision “is extraterritorial in nature and therefore contrary to the principles of public international law.” *Id.* The protester ignores the fact that the United States regularly enters into contracts which require performance outside the United States (*e.g.*, embassy construction, logistics support, and satellite services), and that an entire body of law relates to disputes that arise thereunder. As above, this argument provides no basis to sustain the protest.

choice of procurement approach, absent clear evidence that its decision is arbitrary or unreasonable, or in violation of statute or regulation. *WingGate Travel, Inc., et al.*, B-405007.9, Nov 29, 2011, 2011 CPD ¶ 260 at 4.

Where a protester alleges that performance is impossible, we will not substitute our judgment for that of the agency nor sustain the protest in the absence of clear and convincing evidence that the specifications are in fact impossible to meet or unduly restrict competition. *Instrument Control Serv., Inc.; Science & Mgmt. Res., Inc.*, B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66 at 6. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not show that the agency's judgment is unreasonable. *Chromalloy Component Servs., Inc.*, B-417362.2, Nov. 6, 2019, 2019 CPD ¶ 382 at 4.

The protester contends that if it is required to "check the box" as the Navy's agent on a port's standard form, it must also be granted the actual authority to bind the principal, in this case, the Navy. Protest at 9. The protester does not delineate the precise scope of authority it considers necessary, but makes clear that, at the very least, it should have the authority to enter into contracts as the Navy's agent. *Id.* ("Occasionally, some agents might have limited authority, but one would at least expect them to always have 'some' authority.").

The Navy considers the delegation of its direct contracting authority to an outside contractor here to be a violation of FAR 7.503, which prohibits agencies from contracting for inherently governmental authorities. AR, Tab 12, Contracting Officer's Memorandum for Record, Nov. 19, 2019, at 4. The agency argues that MLS's proposed "approach would be impermissible because FAR 7.503(c)12(iv) states that awarding contracts is an inherently governmental function and because the Navy would violate the Anti-Deficiency Act by agreeing as principal to an open-ended indemnification for all of the 'agent's' costs." COS at 3. The agency asserts that "MLS has not substantiated by 'clear and convincing evidence,' or by any other standard, that there is a 'legal requirement that the Navy be represented by an agent who has the authority to act for it.'" Memorandum of Law (MOL) at 7.

Here, under the RFP, the contractor will identify itself as the agent of the Navy, while at the same time its agency is limited to the scope described in the solicitation. Further, the contractor is required to disclose the limits of agency. The protester does not establish by any standard of review that the act of listing itself as the agent on a port form, combined with the obligation to disclose the scope of its actual authority, renders contract performance an impossibility. The protester also fails to respond to the agency's position that the authority to contract is an inherently governmental function that the agency is prohibited from delegating under FAR 7.503. Furthermore, the record does not support the protester's position. While the protester disagrees with the agency's approach, this objection does not render performance impossible. *Chromalloy Component Servs., Inc., supra*, at 3. Accordingly, we deny this protest ground.

Other Protest Grounds

MLS raises several other protest arguments, none of which has merit. We address several of these below.

The protester alleges that the agency is proceeding in bad faith. Protest at 12. Government officials are presumed to act in good faith, and a protester's contention that contracting officials are motivated by bias or bad faith must be supported by convincing proof. *BTAS, Inc.; Innovative Techs., Inc.*, B-415810.4 *et al.*, Oct. 3, 2018, 2018 CPD ¶ 346 at 10 n.11. Here, apart from MLS's unsupported argument, there is no evidence of bad faith. Its claim amounts to nothing more than unsubstantiated allegations and does not meet our standard for demonstrating bad faith or bias by a procuring agency. Consequently, it is dismissed. *MPC Containment Sys.*, B-416188.2, July 23, 2018, 2018 CPD ¶ 251 at 3 n.5.

Next, under the heading "The Navy's Position is Contrary to the 'Fair Opportunity' Provision Guaranteed by FAR 16.505(b)(1)(ii)(B)," MLS includes only the sentence that it "adopts its argument set forth in the initial Protest," *i.e.*, the protest docketed as B-418477. Protest at 15. However, neither in its prior protest nor in the current one does the protester establish that this procurement is governed by FAR 16.505(b)(1)(ii)(B), which applies to task orders issued under a previously-awarded multiple-award contract. *See generally*, Protest. As a result, we dismiss this protest ground as legally insufficient. 4 C.F.R. § 21.5(f).

In addition, the protester raises in its comments, for the first time, the claim that the terms are inconsistent with customary commercial practice. *Compare* Comments at 5-6 *with* Protest at 7 (mentioning this term, but only in the context of the argument that a portion of paragraph 1.3 was unenforceable). The protester fails to show either that this solicitation is a commercial item procurement or that its argument, based on amendment 0002 to the solicitation (issued on February 5, 2020), is timely. *Id.* at 6; AR, Tab 3, RFP amend. 0002, at 1.

Finally, related to its argument that paragraph 1.3 must be modified, discussed above, MLS seeks to have the solicitation amended so that the Navy bears the burden of problems that arise during contract performance. Protest at 13-14. The Navy argues that MLS simply seeks to avoid liability for damages to Navy vessels caused by a port authority or subcontractor, as this solicitation provides.<sup>5</sup> MOL at 9. Our decisions provide that an agency may provide for a competition that imposes maximum risks on the contractor and minimum burdens on the agency, provided the solicitation contains sufficient information for offerors to compete intelligently and on equal terms. *Al Raha Grp. for Tech. Servs.*, B-412963.3, Sept. 19, 2016, 2016 CPD ¶ 262 at 4.

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<sup>5</sup> MLS states that when it "brought to the attention of the Navy that one of its ships caused damage at the port, the Navy agreed and told MLS to 'stay out of it' because they [the Navy] would resolve the issue." Comments at 9. Although the dispute has apparently not yet been resolved to MLS's satisfaction, the protester's example demonstrates that the Navy will intervene in the manner described in the solicitation.

The protest is denied.

Thomas H. Armstrong  
General Counsel